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No. 935

In the Supreme Court of the United States

OCTOBER TERM, 1962

ATWOOD'S TRANSPORT LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing appellant's suit to set aside an order (J.S. 47a) of the Interstate Commerce Commission. The Commission's order directs appellant, a common carrier of passengers by bus, to cease and desist from transporting charter parties from Fort Belvoir and Alexandria, Virginia, on the

ground that such operations are not within appellant's incidental charter authority.

"Incidental charter authority" is derived from section 208(c) of the Interstate Commerce Act, 49 U.S.C. 308(c), which authorizes motor common carriers of passengers to transport charter parties "under such rules and regulations as the Commission shall have prescribed." Pursuant to that statutory mandate, the Commission instituted an investigation, to which all existing passenger carriers were made parties, to formulate such regulations. After extensive proceedings, in which the bus industry as a whole and numerous individual passenger carriers filed briefs and participated in oral argument, the Commission in 1941 issued regulations [1] which (with one modification not here material) [2] are presently in effect. Appellant here challenges the validity of Rule III of those regulations, which provides that a common carrier of passengers may transport charter parties (1) which originate at any point on its regular route or routes or at any off-route point it is authorized to serve, or (2) "which originate at any point or points within the territory served by its regular route or routes."

The present proceeding arose in June 1959, when the Alexandria, Barcroft and Washington Transit Company (a competitor of appellant and an intervenor in the district court) filed a complaint with the Commission charging that appellant was conducting charter operations from Fort Belvoir and Alexandria, Virginia, without the requisite operating authority

[1] *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25.

[2] Rule V(1) was amended by the Commission in 1948. 48 M.C.C. 521.

from the Commission. Appellant admitted conducting the described operations, but contended that Fort Belvoir and Alexandria are "within the territory served by its regular routes" and thus within the scope of its incidental charter authority.

The Commission (Division 1) concluded, with one dissent, that Fort Belvoir and Alexandria are not "within the territory served" by appellant's regular routes (which run from downtown Washington, D.C., to Germantown and Point Lookout, Maryland) within the meaning of Rule III. The Commission held that identification of "the territory served by [the] regular routes" of a particular carrier depends upon a variety of factual considerations which vary from case to case, "including the individual circumstances, the terrain, the density of the population, proximity of highways, the practical administration of the service, the operations of competing carriers and their ability to perform the service involved" (J.S. 42a). Noting its long-standing recognition "that no rigid standard can be established by which to determine precisely the territory from which a carrier possessing incidental charter rights could originate charter parties" (J.S. 42a–43a), the Commission undertook a detailed scrutiny of the factual context in which appellant conducts the challenged charter operations. The Commission found that appellant's routes, which never enter Virginia, run from southeast to northwest between points in Maryland and through the District of Columbia (J.S. 38a); that Alexandria, Virginia, is approximately 2 miles from the District of Columbia-Virginia boundary and Fort Belvoir from 15 to 20 miles from the boundary, depending upon the route

used (*ibid.*); that "the traffic at Fort Belvoir would have no relation whatever to the service performed by [appellant] over its regular routes" (J.S. 43a); that the character of the Washington, D.C. metropolitan area is such that appellant's regular route operations "have no connection with Virginia, and, consequently, with Washington's suburban appendages in Virginia" (J.S. 44a); and that "a number of well established motor passenger carriers serve Washington, some of which operate over U.S. Highway 1 which passes directly through the military reservation at Fort Belvoir" (*ibid.*). Hence the Commission ordered appellant to cease and desist from conducting the challenged charter operations "unless and until appropriate authority therefor has been obtained" (J.S. 45a, 47a).

On appeal, the three-judge district court sustained the validity of the Commission's Rule III and affirmed its findings that Fort Belvoir and Alexandria are not within the scope of appellant's charter authority under the rule. Addressing itself to appellant's charge that Rule III is unconstitutionally vague, the court below noted that "the law does not require the impossible or even the impracticable" in specificity (J.S. 5a). The court canvassed the Commission's explanation of its reasons for framing Rule III in general rather than specific terms and held that "the Commission acted reasonably in not defining or restricting the words [of Rule III] in question any more precisely or exactly than it did" (J.S. 6a). Reviewing a number of decisions of this Court which upheld statutes and regulations against a charge of unconstitutional vagueness, the district court concluded that

Rule III was similarly invulnerable (J.S. 6a–11a). Finally the district court held that substantial evidence supported the Commission's findings that Fort Belvoir and Alexandria are not "within the territory served" by appellant's regular routes and that the cease and desist order therefore should not be disturbed.

ARGUMENT

It is settled that the definiteness of a statute is to be tested in terms of its application to particular cases and not in the abstract or as it might be applied in proceedings not before the Court. *United States* v. *Raines*, 362 U.S. 17, 22. The same principle is applicable to administrative regulations. Cf. *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337. Appellant seeks to review the issuance of a cease and desist order against it in an administrative proceeding, in which the Commission interpreted one of its rules not to permit appellant to conduct charter operations from Fort Belvoir and Alexandria, Virginia. We submit that the Commission's rule plainly meets the constitutional requirement of definiteness and that the judgment below sustaining its application to appellant's challenged operations should be summarily affirmed.

1. Section 208(c) of the Interstate Commerce Act, 49 U.S.C. 308(c), requires the Commission to adopt rules governing charter operations by certificated passenger motor carriers. Rule III, which is challenged by appellants as unconstitutionally vague, permits such operations to be conducted from points "within the territory served" by a carrier's regular routes.

Appellant would impose upon the Commission a requirement of specificity which is wholly inconsistent with the nature of rule-making. Rules of general applicability necessarily employ generic and inclusive terms to cover categories of proscribed behavior. The general terms must then be interpreted and applied both by the persons regulated and by the enforcing tribunals. Such a limitation inheres in language itself. It would be futile for the Commission to try to predict and describe multifarious specific situations. The constitutional requirement is merely that there be a "reasonable degree of certainty". *Boyee Motor Lines, Inc.* v. *United States,* 342 U.S. 337, 340.

As the district court held (J.S. 5a–6a), the extreme variation in circumstances surrounding the operations of individual bus carriers makes impracticable, if not impossible, the establishment of a rule more specific than the Commission's Rule III. For example, the problem of defining the permissible scope of charter operations in New York City is entirely different from the problem of defining the scope of such operations in rural areas, or even in less densely populated or geographically smaller urban areas. Under Rule III, the scope of a carrier's incidental charter authority is based upon the extent of the "territory served" by the carrier's regular routes. Thus carriers in sparsely settled regions, whose regular route operations actually "serve"—*i.e.,* draw traffic from—a large territory, are permitted a correspondingly large area of charter party origin territory;[3] while carriers such

[3] *E.g., Kirschbaum Extension—Charter Operations,* 52 M.C.C. 670; *Sanford Common Carrier Application,* 8 Fed. Car. Cases, ¶ 32,330; *Indiana Motor Bus Co. Extension, Charter Parties,* 41 M.C.C. 577.

as appellant who, in their regular route operations in densely populated metropolitan areas, "serve" only a relatively limited territory, possess correspondingly limited charter party origin territory.[4] The use of a generalized standard like that in Rule III permits the Commission to resolve rationally and wisely the varying problems which arise in widely different factual contexts. To require a greater degree of specificity than that embodied in Rule III might well foreclose the effective regulation of charter operations by rule. The constitutional requirement of definiteness is not to be so interpreted. *United States* v. *Petrillo*, 332 U.S. 1, 7.[5]

2. Industry understanding, moreover, readily identifies the factors that are to be taken into consideration in determining the extent of the "territory served" by an individual carrier's regular routes. See *McGowan* v. *Maryland*, 366 U.S. 420, 428; *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340–341. The language employed in Rule III was originally sug-

[4] *E.g.*, *Somerset Bus Co.* v. *Suburban Transit Corp.*, 88 M.C.C. 13; *Blue Line, Inc.* v. *Short Line of Connecticut, Inc.*, 88 M.C.C. 201; *Hudson Transit Lines, Inc., Extension*, 76 M.C.C. 215; *Starr Transit Co., Inc., Interpretation of Charter Authority*, 74 M.C.C. 773.

[5] Appellant suggests (J.S. 3, 11) that the Commission should be required to make its rules on the subject of charter operations more definite. But once the Commission's responsibility under Section 208(c) has been met with the promulgation of a constitutionally sufficient rule, the failure of the agency to engage in further rule making is not judicially reviewable. *Attorney General's Manual on the Administrative Procedure Act*, pp. 39, 95; S. Doc. 248, 79th Cong., 2d Sess., pp. 201, 226, 230, 260, 409, 413; *Leighton* v. *Securities and Exchange Commission*, 221 F. 2d 91 (C.A.D.C.).

gested by a passenger carrier association,[6] and the industry as a whole has operated under the regulation for over 20 years. The factors to be considered were enunciated by the Commission in the *Regulations* case, *supra*, 29 M.C.C. at 39, in which Rule III was promulgated, and have been repeated in the various decisions which have been rendered under the rule, including the instant case (J.S. 42a). They include the physical terrain of the area, the density of the population, the proximity of highways, the operations of competing carriers in the area, and the location of natural or political boundaries.[7] Such factors are familiar in the transportation industry and involve matters which are readily ascertainable by any individual carrier in regard to its own operations. Thus, in this case, the pertinent facts—well known to appellant—were the geographic distances between Alexandria and Fort Belvoir on the one hand, and the routes regularly traveled by appellant's vehicles on the other, as well as the segmented character of the Washington metropolitan area (see Statement, *supra*, pp. 3–4).[8]

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[6] *Regulations Governing Special or Chartered Party Service*, *supra*, 29 M.C.C. at 37, quoting language proposed by the American Transit Association.

[7] Despite appellant's implication to the contrary (J.S. 6), the extent of the area embraced in the commercial zone of cities served by a carrier is not one of the factors to be considered, inasmuch as the concept of commercial zones is inapplicable to passenger carriers. *Commercial Zones and Terminal Areas, Seventh Supplemental Report*, 54 M.C.C. 615.

[8] The expression of an informal opinion by a member of the Commission's staff that the challenged charter operations were legitimate, of course, in no way foreclosed the Commission from arriving at a contrary conclusion in a formal proceeding, *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146; *Minneapolis R.R.*

Appellant's contention (J.S. 13) that the operations of competing carriers cannot properly be considered by the Commission under Rule III is without merit. The operations of other carriers are plainly relevant to a factual determination of the extent of the territory from which a carrier draws its regular route business, and thus are appropriately considered in determining the extent of the "territory served" by its regular routes.

3. Finally, Rule III has been construed and applied to appellant's particular operations by the Commission, the expert body whose task it is "to draw its conclusion from the infinite variety of circumstances which may occur in specific instances" *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65.* The district court concluded (J.S. 12a) that, with respect to this particular case, "the record fully justified the conclusion of the Commission that Alexandria and Fort Belvior, Virginia, may not be consid-

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v. *Peoria Ry.*, 270 U.S. 580, 585; nor does the need for an exercise of judgment in applying Rule III vitiate the constitutionality of the regulation. See *Nash* v. *United States*, 229 U.S. 373, 377.

*We recognize that under Section 222 of the Act, 49 U.S.C. 322, persons may be subjected to criminal sanctions for violation of Rule III without prior administrative proceedings. Appellant plainly is not in that position and cannot challenge Rule III as though it were. Cf. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32–33. In any event, criminal sanctions may be imposed only for "knowing and willful" violations. This requirement of culpable intent as a necessary element of the criminal offense "served to 'relieve the [regulation] of the objection that it punishes without warning an offense of which the accused was unaware'." *United States* v. *National Dairy Products Corp.*, *supra*, 372 U.S. at 35; *United States* v. *Ragen*, 314 U.S. 513, 524.

ered to be within the territory served by [appellant's] regular routes." Application of the relevant factors was found (J.S. 11a) clearly to support the Commission's determination that Fort Belvoir and Alexandria, Virginia, which are located a substantial distance from any point served by appellant, in the opposite direction from appellant's regular routes, in a State not served by appellant but served by a number of other carriers, are not "within the territory served" by appellant's regular routes, within the meaning of Rule III. There is no occasion for further review of this factual issue. *Radio Corporation of America* v. *United States*, 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

CONCLUSION

The appeal presents no substantial issue warranting plenary consideration, and the judgment of the district court should be affirmed.

Respectfully submitted.

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